91-766

No. ____

SUPREME COURT
OF THE UNITED STATES
October Term, 1991

Supreme Court, U.S.
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HERMAN COLEMAN AND DHIRAJ N. SHAH,

v. Petitioners,

CORPORATE RISK MANAGEMENT CORPORATION, MIH CONSULTANTS, INC. AND MARTIN HOFFMAN,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

FRANK J. KELLEY
Attorney General
State of Michigan

GAY SECOR HARDY
Solicitor General
Counsel of Record
P. O. Box 30212
Lansing, Michigan 48909
(517) 373-1124

THOMAS L. CASEY
Assistant Solicitor General
HARRY G. IWASKO, JR.
WILLIAM A. CHENOWETH
Assistant Attorneys General
Attorneys for Petitioners

QUESTIONS PRESENTED

I

IN A DIVERSITY ACTION SEEKING MONEY DAMAGES AGAINST TWO STATE OFFICERS ALLEGING ONLY VIOLATION OF STATE LAW IN THE PERFORMANCE OF THEIR OFFICIAL DUTIES, AND WHERE THE RELIEF SOUGHT WOULD INTERFERE IN THE ADMINISTRATION OF STATE LAW BY SUBJECTING STATE OFFICERS TO THE THREAT OF SUBSTANTIAL PERSONAL LIABILITY AND THE SERIOUS EXPENSE AND DISTRACTION OF FEDERAL LITIGATION CHALLENGING THEIR DISCRETIONARY DECISIONS, IS THE SUIT ACTUALLY AGAINST THE SOVEREIGN STATE OF MICHIGAN FOR PURPOSES OF THE ELEVENTH AMENDMENT?

II

CAN RESPONDENTS AVOID THE ELEVENTH AMENDMENT SOVEREIGN IMMUNITY OF THE STATE OF MICHIGAN MERELY BY ASSERTING THAT THE FORMER INSURANCE COMMISSIONER AND HIS PREDECESSOR ACTED ULTRA VIRES BY FAILING TO COMPLY WITH A STATE STATUTE OR BY ACTING IN BAD FAITH OR FOR POLITICAL GAIN IN CARRYING OUT THEIR OFFICIAL DUTIES?

LISTING OF THE PARTIES

Petitioners

The Petitioners are Dhiraj N. Shah, the acting Michigan commissioner of insurance in 1989 when this suit was filed in the District Court and his predecessor in that office, Herman Coleman. Neither Petitioner is currently serving as insurance commissioner.

In addition to suing Petitioners, the Respondents sued the officers, directors, accountant and corporate parent of Cadillac Insurance Company. They are Ernest Solomon, Larry V. Kalosis, Janice K. Aho, Chito Q. Castro, Gloria Solomon, Harry Nelson, Lois Nelson, Ina S. Sachs, Stephen Bromberg, Arlans Insurance Agency and Barry L. Charlip. These other defendants did not participate in any way in Petitioners' appeal to the Court of Appeals.

Respondents

The Respondents are two New York corporations, Corporate Risk Management Corporation and MIH Consultants, Inc., and Martin Hoffman a citizen of New York and sole stockholder of the two corporate Respondents. Corporate Risk Management Corporation acted as a managing general agent for Cadillac Insurance Company.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

LISTING OF THE PARTIES ii

TABLE OF AUTHORITIES vi

OPINIONS BELOW 1

JURISDICTION 2

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED 6

STATEMENT OF THE CASE 7

A. Background Litigation 7

B. The District Court Proceedings in this Case 10

C. The Decisions of the Court of Appeals 15

REASONS FOR GRANTING THE WRIT

A. THIS CASE PRESENTS IMPORTANT QUESTIONS OF FEDERAL LAW CONCERNING THE APPLICATION OF ELEVENTH AMENDMENT IMMUNITY IN THE CONTEXT OF A LAWSUIT NOMINALLY AGAINST TWO STATE OFFICERS IN THEIR "INDIVIDUAL CAPACITIES" WHICH ALLEGES ONLY VIOLATION OF STATE LAW 18

Page

B. THE RELIEF SOUGHT BY RESPONDENTS WOULD OPERATE AGAINST THE STATE 21

C. THE ULTRA VIRES DOCTRINE DOES NOT JUSTIFY FEDERAL COURT JURISDICTION 32

CONCLUSION 49

TABLE OF AUTHORITIES

Pages

Cases

Central Reserve Life of North America Ins Co v Struve, 852 F2d 1158 (9th Cir, 1988) 35

Cohen v Beneficial Industries Loan Corp, 337 US 541; 69 S Ct 1221; 93 L Ed 1528 (1949) 4,16

Ex Parte Young, 209 US 123; 28 S Ct 441; 52 L Ed 714 (1908) 30,35

Harlow v Fitzgerald, 457 US 800; 102 S Ct 2727; 73 L Ed 2d 396 (1982) 28

Johnson v Lankford, 245 US 541; 38 S Ct 203; 62 L Ed 460 (1918) 31,32

Pennhurst State School & Hospital v Halderman, 465 US 89; 104 S Ct 900; 79 L Ed 2d 67 (1984) .....passim

Scheuer v Rhodes, 416 US 232; 94 S Ct 1683; 40 L Ed 2d 90 (1974) 30

Pages

Constitution and Statutes

US Const, Am XI .....passim

42 USC 1983 30

28 USC § 1254(1) 5

28 USC § 1332 2,10

MCL 500.222(1); MSA 24.1222(1) 38

MCL 500.222(3); MSA 24.1222(3) 39

MCL 500.228; MSA 24.1228 .....passim

MCL 500.5252(4); MSA 24.15252(4)... 45

MCL 500.7802; MSA 24.17802 39

MCL 500.7808; MSA 24.17808 40

MCL 500.7838(1); MSA 24.17838(1)... 8,41

MCL 500.8101(4); MSA 24.18101(4)... 8

OPINIONS BELOW

On May 18, 1990 the United States District Court for the Eastern District of Michigan, Southern Division, entered its Memorandum Opinion and Order dated May 16, 1990 denying Petitioners' Rule 12 motion to dismiss. App. 14a-45a. On June 21, 1990 the same District Court entered its Memorandum Opinion and Order dated June 20, 1990 denying Petitioners' Motion for Reconsideration of the May 16, 1990 order. App. 46a-52a. Neither of these opinions is published.

The United States Court of Appeals for the Sixth Circuit dismissed Petitioners' appeal by order entered July 2, 1991. App. 1a-13a. That decision is reported as a table case at 936 F.2d 572 (6th Cir, 1991). The full text of that order is reported at 1991 U.S. App. LEXIS

15001. The order denying the motion for rehearing and suggestion for rehearing en banc was entered September 5, 1991. App. 53a-59a. It is not published.

On September 11, 1991, Petitioners filed a motion in the Court of Appeals to stay the mandate. The Court of Appeals granted the motion by order entered September 13, 1991 and stayed the mandate for 60 days. App. 60a.

JURISDICTION

Respondents filed the original action in District Court based strictly upon diversity of citizenship under 28 USC § 1332. By order entered May 18, 1990 the District Court denied Petitioners' Rule 12 motion to dismiss based upon the Eleventh Amendment and the District Court

denied Petitioners' motion for reconsideration by order entered June 20, 1990.

Petitioners timely appealed the original District Court decision to the Court of Appeals for the Sixth Circuit by claim of appeal filed June 14, 1990. Petitioners filed a second claim of appeal on June 28, 1990 following the denial of their motion for reconsideration. On August 27, 1990 the Court of Appeals ordered the two cases consolidated. Respondents did not challenge the jurisdiction of the Court of Appeals.

By letter dated April 11, 1991 the Court of Appeals sua sponte directed the parties to "come to oral argument prepared to discuss the following issue: Whether Judge Friedman's order is appealable under the collateral order

doctrine enunciated in Cohen v Beneficial Loan Corp., 337 U.S. 541 (1949)." That issue was argued at oral argument April 29, 1991 and Petitioners subsequently filed a supplemental brief on May 9, 1991. Petitioners argued that the District Court decision was immediately appealable under the collateral order doctrine as interpreted by the Court of Appeals.

The Court of Appeals dismissed Petitioners' appeal by order entered July 2, 1991 holding that the appeal was not sufficiently "concluded and closed" because Petitioners might yet prevail on the Eleventh Amendment issue on motion for summary judgment. Petitioners filed a timely motion for rehearing and suggestion for rehearing en banc on July 16,

1991. The Court of Appeals ordered Respondents to reply to this motion.

The Court of Appeals denied the motion for rehearing on September 5, 1991 in a short written order. That order directly stated that "the complaint ... asserts claims against the petitioners, which, if proven, would not be barred by the Eleventh Amendment ... ." This is exactly the question which Petitioners had sought to have the Court of Appeals review.

Petitioners invoke this Court's jurisdiction under 28 USC § 1254(1). This petition is filed within 90 days following the Court of Appeals order denying Petitioners' motion for rehearing.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Eleventh Amendment to the U.S. Constitution states:

> "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."
>
> US Const, Am XI.

Section 228 of the Michigan Insurance Code provides:

> "If it appears from any examination made by the commissioner or from any report made to him pursuant to this code, that any provisions of this code or of any laws of the state have been violated, the commissioner shall immediately report such violation to the attorney general in writing and the attorney general shall take such action thereon as the facts warrant."
>
> MCL 500.228; MSA 24.1228.

STATEMENT OF THE CASE

A. Background Litigation.

Respondents are challenging the actions of the former Michigan insurance commissioners in exercising their judgment how best to deal with a financially troubled insurance company which eventually was ordered liquidated. This suit seeks money damages against the former commissioners in their "individual capacities" for actions taken within the scope of their official duties. Two court cases preceded the filing of this complaint which are relevant here.

Cadillac Insurance Company (hereinafter Cadillac) was placed in conservatorship in Ingham County Circuit Court on July 7, 1989 upon petition of the

Michigan insurance commissioner. The petition for appointment of the conservator alleged that Cadillac was insolvent by more than $17 million. Pursuant to statute[1] the Michigan commissioner of insurance was appointed conservator.

Thereafter on October 10, 1989, the conservator authorized suit on behalf of Cadillac in Oakland County Circuit Court against Respondents, Corporate Risk

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[1]MCL 500.7838(1); MSA 24.17838(1). Chapter 78 of the Insurance Code regulating delinquency proceedings against insurers (which includes this section) was repealed and replaced by a new chapter 81 effective January 3, 1990. 1989 PA 302, §§ 2 and 3. Nevertheless, chapter 78 continues to apply to delinquency proceedings commended prior to January 1, 1990. MCL 500.8101(4); MSA 24.18101(4). Since the delinquency proceedings against Cadillac were begun on July 7, 1989 those proceedings were and continue to be controlled by chapter 78. For the sake of simplicity, Petitioners refer to chapter 78 as though it had never been repealed.

Management Corporation, MIH Consultants, Inc. and Martin Hoffman. That suit sought generally to require Respondents to account for all premiums they received pursuant to a managing general agency agreement with Cadillac and all expenses related thereto. It also asked for damages for breach of the managing general agency contract, fraud and conversion. Respondents (defendants in the suit brought by the conservator) removed the conservator's suit to federal District Court on diversity grounds. When, at the request of the insurance commissioner, Cadillac was ordered liquidated by Ingham County Circuit Court on January 2, 1990, the insurance commissioner was appointed liquidator pursuant to statute and continues to pursue Cadillac's claim (now in federal court) against Respondents.

B. The District Court Proceedings in this Case.

On December 22, 1989 Respondents filed the instant lawsuit in federal District Court in Detroit. Respondents sued officers, directors and the accountant for Cadillac along with Cadillac's corporate parent. In apparent retaliation for the suit brought against them by the conservator, Respondents also sued Petitioners. Respondents' suit was brought strictly on diversity grounds citing 28 USC § 1332. (Complaint at p 4, ¶ 17). They asserted no federal law claims of any kind against any of the defendants, including Petitioners.

Respondents allege in general that the officers, directors and accountant of Cadillac misrepresented Cadillac's finan-

cial condition and that Respondents entered into the managing general agency agreement in reliance on these misrepresentations and spent money on behalf of Cadillac.

Respondents claim they have been damaged in excess of $3,000,000 (e.g. Complaint at p 13, ¶ 48). They are seeking compensatory and exemplary damages plus interest, costs and attorney fees. (Complaint at p 19).

The allegations against Petitioners are found in Count V of the Complaint. Respondents allege that:

1) As early as 1986 Cadillac was in violation of unspecified provisions of the Michigan Insurance Code requiring that companies maintain a stated level of surplus. (Complaint at pp 17-18, ¶ 69).

2) Petitioners failed to report these violations to the attorney

general as required by Michigan law. (Complaint at p 18, ¶ 70).

3) Petitioners failed to take action with regard to Cadillac's financial condition "because of political considerations outside the scope of their offices... ." (Complaint at p 18, ¶ 71).

4) "In reliance upon Cadillac's apparent good standing as a Michigan Insurance Company and the financial responsibility and/or solvency that this good standing signified ..." the two corporate Respondents conducted business with Cadillac and "expended substantial funds on Cadillac's behalf. (Complaint at p 18, ¶ 73).

Respondents assert that they are entitled to compensation from Petitioners to the extent they are unable to recover from Cadillac the sums owed to each of them. (Complaint at p 19, ¶ 74).

On February 22, 1990, Petitioners moved to dismiss the claim against them on the grounds, inter alia, that the fed-

eral courts lack subject matter jurisdiction under the Eleventh Amendment to the U.S. Constitution. By its Memorandum Opinion and Order dated May 16, 1990, the District Court denied Petitioners' motion. This Opinion and Order is not published. It appears in the appendix at pages 14a, et seq.

On the Eleventh Amendment question the District Court found that there were unresolved questions of fact as to whether Petitioners acted without authority in failing to notify the attorney general of the inadequate surplus. Therefore, the District Court denied the motion without prejudice insofar as it

asserted Eleventh Amendment immunity,[2] noting that Respondents would have to prove their allegations at trial or in response to a motion for summary judgment. App. 37a-38a.

Petitioners filed separate answers in the District Court on July 20, 1990. Both "strongly denied" Respondents' allegations that they failed to take action with regard to Cadillac's financial condition for political considerations outside the scope of their authority.

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[2]The District Court denied the motion with prejudice, however, to the extent that it was based upon absolute immunity under Michigan law. The court reasoned that Petitioners had no authority not to notify the attorney general of violations of the Insurance Code. App. 38a-41a. Although Petitioners continue to believe that the District Court misapplied Michigan law on this issue, Petitioners are not challenging the Court of Appeals decision that this part of the District Court order was not immediately appealable under the collateral order doctrine.

On September 6, 1990 the District Court granted Petitioners' motion to stay the proceedings against them pending resolution of this appeal. None of the other defendants have participated in this appeal.

C. The Decisions of the Court of Appeals.

Initially the Court of Appeals for the Sixth Circuit did not reach the Eleventh Amendment question on the merits. In an order entered July 2, 1991 it dismissed Petitioners' appeal on the grounds that it lacked jurisdiction over the appeal. The Court of Appeals reasoned that because the District Court denied the Eleventh Amendment motion without prejudice, the District Court decision was not sufficiently "concluded and

closed" to be immediately appealable under the collateral order doctrine of Cohen v Beneficial Industries Loan Corp, 337 US 541; 69 S Ct 1221; 93 L Ed 1528 (1949). "It is entirely possible that a summary judgment motion will be granted, thereby obviating any need for the commissioners to appeal. Unless and until the Eleventh Amendment issue is resolved against the commissioners with finality, they may not invoke the collateral order doctrine." App. 11a.

Petitioners filed a petition for rehearing and suggestion for rehearing en banc. They argued that the July 2, 1991 order was inconsistent with Sixth Circuit authority authorizing an immediate appeal in analogous qualified immunity cases. Petitioners pointed out that the District

Court order did determine with finality that the Complaint stated a claim which, if proven, was not precluded by the Eleventh Amendment. They asked that the Court of Appeals review this decision on the merits.

Ironically, in denying the petition for rehearing, the Court of Appeals in fact directly decided the merits of Petitioners' appeal. In an order entered September 5, 1991 the Court of Appeals backed away from its earlier rationale that the appeal was not final because Petitioners might still prevail on a motion for summary judgment. The Court of Appeals now flatly stated that the District Court was right when it held that the complaint stated a claim in avoidance of the Eleventh Amendment.

"[T]he complaint ... asserts claims against the petitioners which, if proven, would not be barred by the Eleventh Amendment and the sovereign immunity doctrine of which the amendment is an affirmation. The sovereign immunity doctrine simply does not bar actions for money damages against state officials sued in their personal capacities." App. 57a. Therefore, in its decision that it lacked jurisdiction over the appeal, the Court of Appeals decided the very question which the appeal presented.

REASONS FOR GRANTING THE WRIT

A. THIS CASE PRESENTS IMPORTANT QUESTIONS OF FEDERAL LAW CONCERNING THE APPLICATION OF ELEVENTH AMENDMENT IMMUNITY IN THE CONTEXT OF A LAWSUIT NOMINALLY AGAINST TWO STATE OFFICERS IN THEIR "INDIVIDUAL CAPACITIES" WHICH ALLEGES ONLY VIOLATION OF STATE LAW.

This case presents important federalism questions concerning the authority of

the federal courts to entertain suits against state officers based solely on alleged state law violations while discharging their official duties. Respondents have attempted to avoid the Eleventh Amendment by asserting that they are seeking damages against Respondents in their "individual capacities." They also assert that because Petitioners allegedly violated a state law and acted in bad faith or for political gain, their actions were ultra vires and therefore outside the scope of the Eleventh Amendment.

On the contrary, the relief sought in this case would operate against the state of Michigan in the sense that it interferes in the administration of the state insurance code. Subjecting insurance

commissioners to potential personal liability and the substantial expense and distractions of federal litigation for decisions taken in discharging their official duties, significantly interferes with their ability to make the often difficult decisions required of them under state law. Where there is no question of violation of federal law, there is no justification for invoking the judicial power of the United States to interfere in the administration of state law.

Moreover, this Court emphasized in Pennhurst State School & Hospital v Halderman, 465 US 89; 104 S Ct 900; 79 L Ed 2d 67 (1984), that the ultra vires doctrine, if it has any continuing validity at all, applies only where state officers act without any authority at

all. It does not apply merely because it is alleged that state officers violated state law.

B. THE RELIEF SOUGHT BY RESPONDENTS WOULD OPERATE AGAINST THE STATE.

Justice Stevens' dissent in Pennhurst State School & Hospital, supra, argued that official conduct based upon an incorrect interpretation of state law was not protected by sovereign immunity because it was conduct forbidden by the sovereign. The dissent argued that sovereign immunity cannot apply to conduct which is not authorized by the sovereign (i.e., is contrary to state law).

The Pennhurst majority squarely rejected this interpretation, characterizing it as "out of touch with reality." 465 US at 107. The majority concluded

that the test for determining whether a suit nominally against state officers is "against the state" for purposes of the Eleventh Amendment is whether the relief sought would operate against the state. Generally, a suit operates against the state for purposes of the Eleventh Amendment where the judgment sought would 1) expend itself on the public treasury, 2) interfere with the public administration or 3) restrain the government from acting or compel it to act. 465 US at 101, n 11. Because the injunction entered by the District Court in Pennhurst effectively closed a major state institution and required the creation and funding of new facilities, the relief sought operated against the state even though state law did not authorize the illegal conditions which existed at

the hospital. Since the relief operated against the state, the suit was barred by the Eleventh Amendment.

Respondents in this case are asserting a no less fictitious proposition to avoid sovereign immunity. Although Petitioners were exercising their official duties as insurance commissioner at the time the challenged conduct took place, Respondents claim they can avoid the Eleventh Amendment merely by asserting that they are suing Petitioners in their "individual capacities." They reason that since they are seeking damages against Petitioners "individually" and not from the state treasury, the relief does not operate against the state and the Eleventh Amendment therefore does not apply.

The Eleventh Amendment bars more than just relief which would be paid from the state treasury. It also bars relief which would interfere with the public administration. Subjecting the insurance commissioners to the threat of personal liability and the substantial expense and distractions of litigation in federal court for actions taken while discharging their official duties interferes with the administration of state law.

Suppose that Respondents prevail in this suit and obtain a $3 million judgment against Petitioners payable from their private funds based upon their supposed failure to comply with state law or their supposed failure to take action to remedy Cadillac's financial condition because of political considerations.

That judgment will necessarily have a profound impact upon the current and successor insurance commissioners when they must deal with the next insurer experiencing financial difficulties. Faced with the decision whether to permit a marginal insurer time to attempt to resolve its financial problems or give up and institute delinquency proceedings which will destroy the company, the pressure to institute the delinquency proceeding will be tremendous. No public officer could ignore the danger that by giving the company the chance to rehabilitate itself he subjects himself to time consuming and expensive litigation and potentially staggering personal liability in a federal court at the insistence of one of the company's hundreds of policyholders or creditors.

Arguably money damages against the insurance commissioner personally would be more of an interference than an injunction, since an injunction would spell out the required conduct or at least leave open the possibility of seeking clarification from the court which issued it. Who can say at what point some federal court will conclude after the fact that "political considerations" were improper or were given too much weight in the commissioner's balancing of competing interests? Or who can predict when a federal court may interpret state law in a way it was never previously

interpreted?[3] In short, a multimillion dollar personal judgment against the insurance commissioner is at least as much an interference with the administration of state law as an injunction to the same effect. Respondents' position that the suit is not against the state because the commissioners are sued "individually" ignores the real impact of the relief sought.

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[3]In this case the District Court interpreted § 228 of the Insurance Code to require that the insurance commissioner inform the attorney general of every violation of the insurance code which comes to light. App. 33a-35a. Neither the attorney general nor the insurance commissioner had interpreted § 228 in this way because for nearly all violations which are not criminal, the insurance commissioner can commence administrative enforcement action without the prior approval of the attorney general. The requirement is left over from earlier times when the commissioner could not commence enforcement action on his own. No Michigan appellate court has interpreted this section at all.

This Court recognized the deleterious consequences to the public of exposing government officials to litigation challenging their official decisions in an analogous context in Harlow v Fitzgerald, 457 US 800; 102 S Ct 2727; 73 L Ed 2d 396 (1982).

> "At the same time, however, it cannot be disputed seriously that claims frequently run against the innocent as well as the guilty--at a cost not only to the defendant officials, but to the society as a whole. These social costs include the expenses of litigation, the diversion of official energy from pressing public issues, and the deterrence of able citizens from acceptance of public office. Finally, there is the danger that fear of being sued will 'dampen the ardor of all but the most resolute, or the most irresponsible [public officials], in the unflinching discharge of their duties.' Gregoire v Biddle, 177 F2d 579, 581 (CA2 1949) cert denied, 339 US 949, 94 L Ed 1363, 70 S Ct 803 (1950)."
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> 457 US 800, 814 (footnote omitted).

Moreover, in all likelihood the state of Michigan will pay any judgment against

Petitioners ordered in this case. It would be a practical impossibility to find capable candidates to take on the duties of the insurance commissioner if commissioners were required to pay such judgments from their personal funds. Considering the tremendous financial impact of the decisions which the commissioner is required to make under state law, the potential personal liability is staggering.

Petitioners are not contending that they may never be sued in federal court for conduct undertaken broadly within the scope of their official duties. Where it is alleged that their conduct violates federal constitutional or statutory restrictions, there is a federal interest sufficient to justify federal court

jurisdiction. It is this need to "vindicate the supreme authority of the United States" which justifies the fiction in Ex Parte Young, 209 US 123; 28 S Ct 441; 52 L Ed 714 (1908), that a suit against a state officer acting contrary to federal law is not one against the state. Pennhurst, supra, 465 US at 105.

Petitioners' position is not, therefore, contrary to cases such as Scheuer v Rhodes, 416 US 232; 94 S Ct 1683; 40 L Ed 2d 90 (1974), where the plaintiffs asserted that official conduct of state officers violated their rights under 42 USC § 1983. In this case the alleged violations are solely violations of state law. Respondents are asserting that Petitioners failed to comply with MCL 500.228; MSA 24.1228 by failing to

inform the attorney general of the fact that Cadillac had less than the statutory minimum in surplus. Respondents do not assert that this failure to inform the attorney general violated any federal law, whether constitutional or statutory. The sole basis asserted for federal court jurisdiction was diversity of citizenship. There is, therefore, no supreme federal authority to justify "making one sovereign appear against its will in the courts of the other." Pennhurst, 465 US at 116-117.

Petitioners acknowledge that Johnson v Lankford, 245 US 541; 38 S Ct 203; 62 L Ed 460 (1918), is factually similar to this case in some respects and held that an action against the Oklahoma banking commissioner personally for damages

resulting from a bank failure was not barred by the Eleventh Amendment. However, in Pennhurst the majority described this case and others relied upon by the dissent as "moribund" and noted specifically that Johnson v Lankford has never been cited by this Court in the context of the Eleventh Amendment at all. 465 US at 115 and n 27. Moreover, there is nothing in that short opinion which suggests that the Court considered the practical effect of the relief sought there on the State of Oklahoma.

C. THE ULTRA VIRES DOCTRINE DOES NOT JUSTIFY FEDERAL COURT JURISDICTION.

Respondents argued below that Petitioners acted ultra vires and therefore are not covered by Eleventh Amendment

immunity. They asserted in their brief in the District Court that "these defendants acted for the sole purpose of furthering their own political futures. Their actions were ultra vires and clearly not in furtherance of any duty that the state required of them in their official capacities, but to the contrary a violation of their duties." (Respondents' Brief in Opposition to Motion to Dismiss, at p 4).

To begin with, it is not at all clear that the ultra vires doctrine survived the Pennhurst decision. The Pennhurst majority questioned the continued validity of the ultra vires doctrine and expressly limited it "to the extent the doctrine is consistent with the analysis of this opinion."

"We have noted that the authority-stripping theory of Young is a fiction that has been narrowly construed. In this light, it may well be wondered what principled basis there is to the ultra vires doctrine as it was set forth in Larson and Treasure Salvors. That doctrine excepts from the Eleventh Amendment bar suits against officers acting in their official capacities but without any statutory authority, even though the relief would operate against the State. At bottom, the doctrine is based on the fiction of the Young opinion. The dissent's method is merely to take this fiction to its extreme. While the dissent's result may be logical, in the sense that it is difficult to draw principled lines short of that end, its view would virtually eliminate the constitutional doctrine of sovereign immunity. It is a result from which the Court in Larson wisely recoiled. We do so again today. For present purposes, however we do no more than question the continued vitality of the ultra vires doctrine in the Eleventh Amendment context. We hold only that to the extent the doctrine is consistent with the analysis of this opinion, it is a very narrow exception that will allow suit only under the standards set forth in n 11 supra."

Pennhurst, supra, 465 US at 114, n 25 (Emphasis added).

Applying the Pennhurst analysis, there simply is no place in Eleventh Amendment jurisprudence for an ultra vires exception any longer. Pennhurst held that the Ex Parte Young, supra, fiction applies only where it is necessary to vindicate the supreme federal law. Where a complaint makes only state law claims against an official defendant and therefore there is no federal interest to justify federal court jurisdiction, the Eleventh Amendment question is simply whether the relief sought would operate against the state. If it does, then the Eleventh Amendment applies and the suit is barred. See Central Reserve Life of North America Ins Co v Struve, 852 F2d 1158, 1161 (9th Cir, 1988) (Whether or not a state is "the real party in interest," under Pennhurst the Eleventh

Amendment bars a suit for declaratory and injunctive relief against the insurance commissioner "in his individual capacity" based upon alleged violations of state law.)

But even if the ultra vires exception is still valid, it does not apply in this case because Petitioners were not acting without any authority at all. In one sense the state mental health officials in Pennhurst acted without authority. They had no authority not to provide adequate mental health services. Nevertheless, the Pennhurst Court concluded their actions "plainly were not beyond their delegated authority" for purposes of the ultra vires doctrine.

> "Petitioners' actions in operating this mental health institution plainly were not beyond their delegated authority in this sense. The [Mental Health and Mental Retarda-

> tion] Act gave them broad discretion to provide 'adequate' mental health services. Pa State Ann, Tit 50, § 4201(1) (Purdon 1969). The essence of respondents' claim is that petitioners have not provided such services adequately."
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> Pennhurst, supra, 465 US at 101-102, n 11.

Under Michigan law the insurance commissioner has sweeping authority to examine the books and records of insurance companies, to examine their officers and directors under oath and to take appropriate action to address their financial condition. The Insurance Code broadly provides that commissioner or his deputies "may examine any or all of the books, records, documents, and papers of any insurance corporation at any time after its articles of incorporation have been executed and filed, or after it has been authorized to do business in this

state." MCL 500.222(1); MSA 24.1222(1) (Emphasis added).

Such an examination is not limited to viewing documents. The commissioner, his deputies or any of his examiners "may examine under oath the officers or agents of the insurer or all persons deemed to have material information regarding the insurer's property or business." The statute expressly mandates that insurer, its officers and its agents and "any other person may be required to produce any books or papers deemed to be relevant to the examination for the inspection of the commissioner, his or her deputy or examiners, whenever required and the officers or agents of the insurer shall facilitate the examination and aid in making the same so far as it is in their

power to do so." MCL 500.222(3); MSA 24.1222(3) (Emphasis added). It is hard to even imagine broader powers of examination.

The commissioner is also given broad, exclusive discretion to determine whether and when to seek delinquency proceedings against an insurer under chapter 78.[4] Under MCL 500.7802; MSA 24.17802, "The commissioner may apply to the circuit court ... for an order directing the corporation to show cause why the commissioner should not take possession of its property and conduct its business, or for other appropriate relief ... if the corporation meets any of the following

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[4]Although repealed and replaced effective in 1990, chapter 78 continues to apply to this action because it was commenced before chapter 78 was repealed. See note 1, supra.

conditions: (a) Is insolvent ... ." (Emphasis added). Although the commissioner may seek judicial relief, clearly under state law he is not commanded to do so even when a company is insolvent.

Moreover, the insurance commissioner is the only person who may bring such a petition and he is the only person who may be appointed receiver. The Insurance Code expressly provides that no court in the state can entertain a request for dissolution of or appointment of a receiver for an insurer "unless the same is made by the attorney general upon relation or application of the commissioner of insurance of this state." MCL 500.7808; MSA 24.17808. "When under the laws of this state a receiver is to be appointed in delinquency proceedings for

an insurer domiciled in this state, the court shall appoint the insurance commissioner as the receiver." MCL 500.7838(1); MSA 24.17838(1) (Emphasis added).

Pursuant to the foregoing statutes, it was unquestionably within the authority of the insurance commissioner to examine Cadillac's financial condition and to take action against Cadillac when, and to the extent, that the commissioner determined it was necessary. In fact, that is exactly what the commissioner did. First he gave Cadillac time to resolve its financial problems without resort to the courts. When Cadillac failed, he initially sought a conservatorship in state circuit court and later sought and obtained authority to liqui-

date the company. This is not only within his authority--it is a decision committed to his discretion.

Respondents' complaint against Petitioners is essentially that Respondents disagree with the way Cadillac's financial condition was handled. They assert that Petitioners "failed to take action with regard to Cadillac's financial condition because of political considerations outside the scope of their offices ...." (Complaint at p 18, ¶ 71). They claim they relied upon "... Cadillac's apparent good standing as a Michigan Insurance Company and the financial responsibility and/or solvency that this good standing signified ..." in entering into transactions with Cadillac. (Complaint at p 18, ¶ 73). Under state

law, however, the insurance commissioner has discretion to decide the appropriate response to the Cadillac financial problem. Even where an insurer is insolvent, the commissioner need not seek a receivership, though clearly he may where he determines less drastic measures are not appropriate. The fact an insurer is not in receivership simply does not "signif[y]" "financial responsibility and/or solvency."

Respondents argue that the commissioner had no discretion under § 228 of the Insurance Code, MCL 500.228; MSA 24.1228. He was statutorily mandated to inform the attorney general of Cadillac's inadequate surplus. This argument is a red herring contrived to sidestep the fact that the insurance commissioner has

broad discretion to determine whether and when to initiate insolvency proceedings. Any failure to notify the attorney general of the inadequacy of Cadillac's surplus has nothing at all to do with "Cadillac's apparent good standing as a Michigan Insurance Company" upon which Respondents say they relied. It is the insurance commissioner, not the attorney general, who is authorized to seek delinquency proceedings against Cadillac or to otherwise require it to improve its financial condition.

While § 228 states that the attorney general "shall take such action" upon a reported violation "as the facts warrant," this simply means that the attorney general shall take such action as he has authority to take as the facts

warrant. Since, as previously described, it is the insurance commissioner who has the authority to deal with a financially troubled insurer, a report to the attorney general that Cadillac's surplus was inadequate would not "warrant" any action by the attorney general.

On the other hand, were the insurance commissioner to report violations to the attorney general which constitute criminal offenses, the attorney general would have the responsibility to review the facts and determine whether criminal charges are appropriate. See, e.g., MCL 500.5252(4); MSA 24.15252(4), making a violation of § 5252 a felony. Section 228 neither expands the authority of the attorney general nor diminishes that of the insurance commissioner.

Respondents' interpretation of the ultra vires exception would swallow the rule. It would mean that suits against state officers seeking relief under state law which operates against the state are prohibited by the Eleventh Amendment except where state officers violated state law. Yet if state officers did not violate state law, there would be virtually no state law claims to pursue. The immunity would never apply. On the contrary, under Pennhurst the ultra vires exception to immunity is limited to those cases where an officer acts "without any authority whatever." 465 US at 101, n 11.

In short the validity of the ultra vires doctrine was questioned in Pennhurst and survives if at all only to the extent it "is consistent with the

analysis of this opinion." Pennhurst, 465 US at 114, n 25. It is not consistent with the Pennhurst analysis to permit federal courts to tell state officers how to comply with state law absent any federal law claim, merely because the Respondents seek money damages against the state officers "individually." Whether the relief sought is an injunction or a personal money judgment against the Petitioners, the relief operates against the state and therefore is prohibited. If actions taken in violation of state law were ultra vires for that reason alone, then the Eleventh Amendment immunity would be virtually meaningless.

Finally, a decision in Petitioners' favor on the Eleventh Amendment issue

does not of itself deny Respondents relief. It is, instead, merely recognition that state law claims for relief which operates against the state must be sought in state courts. Where there are no federal law claims, the Eleventh Amendment compels this result.

CONCLUSION

For the reasons set forth in this petition, Petitioners respectfully request this Court to grant the writ of certiorari.

Respectfully submitted,

FRANK J. KELLEY
Attorney General

Gay Secor Hardy
Solicitor General
Counsel of Record
P.O. Box 30212
Lansing, Michigan 48909
(517) 373-1124

Thomas L. Casey
Assistant Solicitor General

Harry G. Iwasko, Jr.
William A. Chenoweth
Assistant Attorneys General

Attorneys for Petitioners

APPENDIX

APPENDIX

Table of Contents

	Page
Unpublished Opinion of the United States Court of Appeals for the Sixth Circuit dated July 2, 1991	1a
Memorandum Opinion and Order of the United States District Court dated May 16, 1990	14a
Memorandum Opinion and Order of the United States District Court dated June 20, 1990	46a
Order of the Sixth Circuit Court of Appeals dated September 5, 1991	53a
Order of the Sixth Circuit Court of Appeals dated September 13, 1991, staying the mandate	60a

Nos. 90-1713, 90-1730

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

CORPORATE RISK MANAGEMENT CORPORATION, et al.,	)	
Plaintiffs-Appellees,	)	ON APPEAL FROM THE UNITED STATES
v	)	DISTRICT COURT FOR THE
ERNEST SOLOMON, et al.,	)	EASTERN DISTRICT OF
Defendants,	)	MICHIGAN
HERMAN COLEMAN and DHIRAJ N. SHAH,	)	
Defendants-Appellants.	)	

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION. Sixth Circuit Rule 24 limits citation to specific situations. Please see Rule 24 before citing in a proceeding in a court in the Sixth Circuit. If cited, a copy must be served on other parties and the Court. This notice is to be prominently displayed if this decision is reproduced.

Decided and Filed July 2, 1991

BEFORE: NELSON and NORRIS, Circuit Judges, and LIVELY, Senior Circuit Judge.

DAVID A. NELSON, Circuit Judge. This is an appeal from an interlocutory order in which the district court denied a motion by two defendants (the State of Michigan's Acting Commissioner of Insurance and his immediate predecessor) for dismissal on Eleventh Amendment and state-law immunity grounds. The threshold issue is whether 28 U.S.C. § 1291 gives us appellate jurisdiction. Concluding that it does not, we shall dismiss the appeal.

I

The Michigan Department of Licensing and Regulation instituted proceedings in

a state court to have Cadillac Insurance Company, a Michigan corporation, placed in conservatorship because of insolvency. The conservatorship was granted, and the company was subsequently liquidated.

Invoking the diversity jurisdiction of the federal district court, the plaintiffs in the case at bar sued the commissioner of insurance, his successor, and the insurance company's officers, directors, accountant, and corporate parent. The plaintiffs alleged that they lost substantial amounts of money by entering into contracts with the insurance company in reliance on misrepresentations by the non-governmental defendants concerning the company's financial condition. As to the governmental defendants, the plaintiffs asserted that to further their political ambitions the commissioners

wrongfully failed to report violations of the state insurance code by the company. The plaintiffs sought compensatory and exemplary damages plus interest, costs, and attorney's fees.

The defendant commissioners moved for dismissal on the ground that the suit against them was a suit against the state and was barred by the Eleventh Amendment. At oral argument on this motion, the commissioners also asserted that they were entitled to absolute immunity under Michigan law.

The district court denied the motion to dismiss on both grounds. As to Eleventh Amendment immunity, the court concluded that the plaintiffs' allegations were sufficient, if proven, to support a claim that the commissioners had exceeded their authority and thus did not

represent the state. This branch of the motion was denied without prejudice, however, the court noting that it would "permit [the] defendants to raise the eleventh amendment immunity issue in a motion for summary judgment or at any other appropriate point in the proceedings." Insofar as the commissioners claimed immunity under Michigan law, their motion to dismiss was denied with prejudice.

II

This court has jurisdiction to review "all final decisions of the district courts of the United States." 28 U.S.C. § 1291. A final decision is one that "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." Catlin v. United

States, 324 U.S. 229, 233 (1945).

Certain orders that are not final in the sense of ending the litigation on the merits are immediately appealable under the collateral order doctrine of Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541 (1949). To come within this doctrine, an order "must conclusively determine the disputed question, resolve an important issue completely separate from the merits of the action, and be effectively unreviewable on appeal from a final judgment." Coopers & Lybrand v. Livesay, 437 U.S. 463, 468 (1978). Cf. In re Post-Newsweek Stations, Michigan, Inc., 722 F.2d 325, 328-29 (6th Cir. 1983).

An order denying a motion to dismiss does not end the litigation on the merits and is not ordinarily subject to appellate review until a final judgment has

been entered. Gould, Inc. v. Pechiney Ugine Kuhlmann, 853 F.2d 445, 450 (6th Cir. 1988). In Mitchell v. Forsyth, 472 U.S. 511 (1985), however, the United States Supreme Court held that an immediate appeal could be taken from an interlocutory order denying a claim of qualified immunity. The collateral order doctrine applies to such orders, Mitchell held, because qualified immunity entitles the defendant not to stand trial; a denial of immunity is thus effectively unreviewable on appeal from a final judgment, because the defendant will already have had to stand trial by the time a final judgment is entered. Id. at 525-27. In deciding whether a denial of a motion to dismiss is immediately appealable, "[t]he critical question, following Mitchell, is whether 'the

essence' of the claimed right is a right not to stand trial." Van Cauwenberghe v. Biard, 486 U.S. 517, 524 (1988).

Most courts that have considered the question have held orders denying motions predicated on the Eleventh Amendment to be immediately appealable under the collateral order doctrine. See, e.g., Dube v. State University of New York, 900 F.2d 587 (2d Cir. 1990) ("the denial of a motion to dismiss claims on absolute Eleventh Amendment immunity grounds is immediately appealable"), cert. denied, 59 U.S.L.W. 3824 (1991); Eng v. Coughlin, 858 F.2d 889 (2d Cir. 1988) (immediate appeal may be taken from denial of motion for summary judgment predicated on the Eleventh Amendment); Minotti v. Lensink, 798 F.2d 607 (2d Cir. 1986) (denial of motion to dismiss based on the Eleventh

Amendment is immediately appealable under the collateral order doctrine), cert. denied, 482 U.S. 906 (1987); Loya v. Texas Dept. of Corrections, 878 F.2d 860 (5th Cir. 1989) (same); Coakley v. Welch, 877 F.2d 304 (4th Cir.) (same), cert. denied, 110 S. Ct. 501 (1989); Libby v. Marshall, 833 F.2d 402 (1st Cir. 1987) (contra). See also Gould, Inc. v. Pechiney Ugine Kuhlmann, 853 F.2d 445 (6th Cir. 1988) (denial of a motion to dismiss predicated on foreign sovereign immunity is immediately appealable). The essence of an Eleventh Amendment claim is a right not to stand trial. A district court's rejection of an Eleventh Amendment claim is thus effectively unreviewable after judgment has been rendered on the merits, just as denial of the qualified immunity claim asserted in Mitchell

would have been effectively unreviewable by the time of final judgment.

But immediate appellate review is only appropriate if the order in question meets all of the requirements for review under the collateral order doctrine. One of these requirements, as we have seen, is that the order determine the disputed question "conclusively." Cohen teaches that there can be no finality "[s]o long as the [collateral] matter remains open, unfinished or inconclusive;" to be appealable under the collateral order doctrine, Cohen suggests, the district court's action on the appellant's application must be "concluded and closed . . . ." Cohen, 337 U.S. at 546.

Although the order denying the Eleventh Amendment claim in the case at bar met the requirement that it be effec-

tively unreviewable after final judgment, the order did not leave the Eleventh Amendment question "concluded and closed." The district court denied the commissioners' motion to dismiss "without prejudice," expressly inviting the commissioners to raise their Eleventh Amendment claim in a motion for summary judgment. It is entirely possible that a summary judgment motion will be granted, thereby obviating any need for the commisioners to appeal. Unless and until the Eleventh Amendment issue is resolved against the commissioners with finality, they may not invoke the collateral order doctrine. See United States v. Yonkers Bd. of Educ., 893 F.2d 498 (2d Cir. 1990) (appellate court lacks jurisdiction to consider appeal from denial of motion to dismiss predicated on the Eleventh Amend-

ment where the denial was without prejudice to the defendants' right to move for summary judgment). See also Howes v. Ashland Oil, Inc., No. 87-5939, 1991 U.S. App. LEXIS 10306 (6th Cir. May 6, 1991).

Circuit precedent precludes review at this time of the denial of absolute immunity under Michigan law, notwithstanding that this immunity claim was denied with prejudice. See Marrical v. Detroit News, Inc., 805 F.2d 169, 172 (6th Cir. 1986), where (over the dissent of the writer of the present opinion) this court was able to find "no indication that Michigan's doctrine of absolute or qualified immunity includes a right to be free from the exigencies of trial." Because immunity does not mean the same thing in Michigan that it means elsewhere, the court concluded, "Michigan law affords no basis

for imposing on litigants the burdens of an interlocutory appeal." Id. In the case at bar the defendant commissioners have conceded that the denial of their absolute immunity claim is not immediately appealable, standing alone, as long as Marrical continues to represent the law of the circuit.

Accordingly, we DISMISS the commissioners' appeal for lack of appellate jurisdiction.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

CORPORATE RISK MANAGEMENT CORPORATION, a New York corporation, MIH CONSULTANTS, INC., a New York corporation, and MARTIN HOFFMAN, a New York resident,

Plaintiffs,

v. Civ. Action No. 89-73690
Hon. Bernard A. Friedman

ERNEST SOLOMON, LARRY V. KALOSIS, JANICE K. AHO, CHITO Q. CASTRO, GLORIA SOLOMON, HARRY NELSON, LOIS NELSON, INA S. SACHS, STEPHEN BROMBERG, ARLAN'S INSURANCE AGENCY, BARRY L. CHARLIP, C.P.A., HERMAN COLEMAN and DHIRAJ N. SHAH,

Defendants.
_____/

MEMORANDUM OPINION AND ORDER

I.

Presently before the court is defendants Herman Coleman and Dhiraj N. Shah's

motion to dismiss. Defendants have filed their motion pursuant to Fed. R. Civ. P. 12(b)(1), 12(b)(6), and 56(b). However, a motion under Rule 56(b) is properly titled a motion for summary judgment. Rule 16(c) of the Local Rules for the United States District Court for the Eastern District of Michigan requires that all papers filed with the court show "the name or nature of the paper in sufficient detail for identification . . ." Because defendants have identified their filing as a motion to dismiss, and because it is clear from the substance of the motion and the relief requested that it is only a motion to dismiss and the court will not consider matters outside the pleadings, the court will address the motion only under Rule 12.

Plaintiffs have filed a response in

opposition to the motion. The court held a hearing in this matter on April 12, 1990, with counsel for all parties present. At that time, the court requested that the parties simultaneously submit supplemental briefs with respect to the issue of absolute immunity which defendants raised for the first time at the hearing. Both sides have now complied with the court's request.

II.

A.

This action arises out of a business relationship which existed between plaintiffs and Cadillac Insurance Company ("Cadillac"). Plaintiffs wrote certain insurance business for Cadillac and state that they expended substantial funds on Cadillac's behalf, allegedly relying on

the representations of Cadillac's officers and directors that the company was operating in accordance with Michigan law and to the satisfaction of the Michigan Insurance Bureau. However, plaintiffs claim that by 1986, Cadillac was in violation of state insurance laws and regulations concerning the financial condition of insurance companies and the need for them to maintain an adequate surplus. Cadillac eventually became insolvent and is now in receivership, apparently exposing plaintiffs to liability for insurance business they wrote on behalf of Cadillac.

Defendants Coleman and Shah both served in the capacity of state commissioner of insurance during the time that Cadillac was having financial difficulties. There is no dispute that the com-

missioner is charged with regulation of the insurance business in Michigan and is responsible for monitoring the financial condition of insurance companies authorized to do business in the state to insure that they comply with the financial requirements set forth in the state insurance code. State law requires insurance companies to submit periodic reports on their financial condition and authorizes the commissioner to conduct financial examinations of the companies. Plaintiffs state that if a financial examination reveals a violation of state insurance law, the commissioner must immediately report the violation to the State attorney general.

According to defendants, the insurance bureau conducted a financial examination of Cadillac in 1986 which revealed

that the company had certain financial problems. Cadillac represented to the bureau that in 1986 it had a surplus of $8.7 million. The bureau continued its financial examination throughout 1986 and 1987, and released a public examination report in July 1987 with a finding that the company's surplus was $5.5 million.

Defendants state that from July 1987 through July 1989, the insurance bureau continued to monitor Cadillac's financial condition. They aver that Cadillac continued to show some financial problems in its reports it filed with the insurance bureau, and by 1988, Cadillac was working under a plan to restore its financial condition. According to defendants, the bureau commenced another financial examination of Cadillac in March 1989, which revealed that Cadillac had a negative

surplus and was therefore insolvent. Cadillac met with the insurance bureau to discuss the problem, and Shah, who became acting commissioner in 1988, notified the attorney general's office of Cadillac's possible insolvency in April 1989.

Shah states that he became unconvinced that Cadillac could restore its financial condition and in June 1989 he formally requested that the attorney general seek a court order placing Cadillac in temporary conservatorship, which the court entered on July 7, 1989. The court ordered a permanent liquidating receivership on January 2, 1990.

B.

As noted above, the complaint alleges that although Cadillac's financial records disclosed problems with the sur-

plus as early as 1986, Coleman and Shah failed to report Cadillac's violations of state insurance law to the attorney general or take other steps within their power to prevent Cadillac from continuing to transact business despite its insolvent financial condition.

Plaintiffs allege that Coleman and Shah failed to take action with regard to Cadillac's financial condition because of political considerations outside the scope of their official duties. See Complaint at paragraph 71. Plaintiffs assert in their response to defendants' motion that both defendants did not act because of their desire to seek favor with Shelby Solomon, the Michigan Director of Management and Budget. Shelby Solomon is the son of co-defendant Ernest Solomon, Cadillac's president and

allegedly a major political contributor. As a result, plaintiffs have sued Coleman and Shah individually, alleging that their actions were ultra vires, not in good faith, and constituted gross negligence or intentional misconduct.

C.

In their motion to dismiss, defendants Coleman and Shah argue that the court lacks subject matter jurisdiction over the claims against them and that plaintiffs have failed to state a claim because the eleventh amendment to the U.S. Constitution bars suits against state officials in such circumstances. Defendants contend that their actions with respect to Cadillac were authorized by state law and that they never acted beyond the scope of their authority. In

their supplemental brief, they argue that their alleged conduct was not ultra vires because they are not charged with exceeding the limits of their authority. Instead, they claim that they are only charged with conduct which does not conform to their duties. Defendants state that plaintiffs do not allege that they took improper actions but rather that they failed to take any action at all. As such, defendants argue that their actions could not have been beyond the scope of their authority.

Defendants also assert in their supplemental brief that because they were acting within the scope of their authority, they are absolutely immune from suit under Michigan law. They argue that they were merely performing their official duties when they decided they were not

required to notify the attorney general of Cadillac's financial condition in 1986. When they did find that Cadillac was insolvent in 1989, they state that they reported this fact to the attorney general as state law requires.

In response, plaintiffs assert that there was no authorization under Michigan law for the defendants to have refrained from reporting Cadillac's alleged violations of state insurance laws. As a result, they contend that defendants' actions were ultra vires or beyond their authority and were not in furtherance of any duty required by state law. To the contrary, plaintiffs assert that defendants violated their legal duties. In addition, they argue that defendants are not entitled to absolute immunity for several reasons.

III.

A.

Defendants assertion that the eleventh amendment precludes plaintiffs' from bringing suit against them in federal court raises a challenge to this court's subject matter jurisdiction over the case. Pennhurst State School & Hospital v. Halderman, 465 U.S. 89, 99 n.8, 100 (1984). As such, defendants' motion is properly analyzed under Fed. R. Civ. P. 12(b)(1). "[W]here subject matter jurisdiction is challenged pursuant to Rule 12(b)(1), the plaintiff has the burden of proving jurisdiction in order to survive the motion." Moir v. Greater Cleveland Regional Transit Authority, 895 F.2d 266, 269 (6th Cir. 1990). In addition, "the court is empowered to resolve

factual, disputes when subject matter jurisdiction is challenged." Id. The court must consider the Rule 12(b)(1) motion first because the Rule 12(b)(6) challenge is moot if the court lacks subject matter jurisdiction. Id.[1]

B.

The eleventh amendment provides:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

U.S. Const. amend. XI.

While the amendment on its face does not bar suits against a state by its own citizens, the "[Supreme] Court has consistently held that an unconsenting State is immune from suits brought by its own

citizens as well as citizens of another State." Edelman v. Jordan, 415 U.S. 651, 662-63 (1974) (emphasis added). This principle is so strong that it even bars suits when the state is not named as a party to the action if "'the action is in essence one for the recovery of money from the state [and] the state is the real, substantial party in interest ...'" Id. at 663, quoting Ford Motor Co. v. Department of Treasury, 323 U.S. 459, 464 (1945). As a result, "the rule has evolved that a suit by private parties seeking to impose a liability which must be paid from public funds in the state treasury is barred by the Eleventh Amendment." Id. The suit is also against the sovereign, and therefore subject to the operation of the eleventh amendment, if the judgment would interfere with the

administration of public affairs or would restrain the state from acting or compel it to act. Pennhurst, 465 U.S. at 101 n.11.

In the instant case, plaintiffs have brought a tort claim under state law against defendants Coleman and Shah for gross negligence or intentional misconduct for acting outside the scope of their authority in bad faith. See Complaint at paragraphs 71-72. As a general matter, the eleventh amendment forbids federal courts from hearing claims against state officials or the state itself for violations of state law. Freeman v. Michigan Department of State, 808 F.2d 1174, 1179 (6th Cir. 1987); see also Pennhurst, 465 U.S. at 106, 121 (Noting that "[i]t is difficult to think of a greater intrusion on state sover-

eignty than when a federal court instructs state officials on how to conform their conduct to state law", the court concluded that "a claim that state officials violated state law in carrying out their official responsibilities is a claim against the State that is protected by the Eleventh Amendment").

However, plaintiffs have not sued Coleman and Shah in their official capacity but rather as individuals. it is clear that "[t]he eleventh amendment does not prevent plaintiffs from bringing suits for money damages against state officials provided that the defendants are sued in their individual capacities." Foulks v. Ohio Department of Rehabilitation and Correction, 713 F.2d 1129, 1233 (6th Cir, 1983); see also Scheuer v. Rhodes, 416 U.S. 232, 238 (1974) (The

court found that the eleventh amendment does not prohibit the recovery of damages against individuals in some circumstances in spite of the fact that they hold public office). As the Foulks court stated, "[i]n such cases, 'damages are payable by the officer, provided primary and remedial law gives the plaintiff a cause of action against the officer for the specific actions contested.'" Id., quoting L. Tribe, American Constitutional Law 132 (1978).

C.

In order to determine whether state officials are individually liable for damages in a particular case, the court must ascertain whether the officials acted within their official capacities or were instead acting ultra vires. See 13

C. Wright, A. Miller, and E. Cooper, Federal Practice and Procedure § 3524, at 158-59 (1984 and Supp. 1990) ("[I]f the state officers merely are carrying out their duties under state law and have violated no federal law, the suit is essentially one against the state, and hence barred by the Eleventh Amendment . . ."). In other words, these defendants are individually liable for actions taken while holding public office only if they exceeded their authority in taking those actions. Defendants are liable only for actions taken beyond the scope of their authority.

As the supreme court stated in Florida Department of State v. Treasure Salvors, Inc., 458 U.S. 670, 689 (1982) (Stevens, J., concurring), the "Eleventh Amendment does not bar an action against

a state official that is based on a theory that the officer acted beyond the scope of his authority . . ." It is conduct taken by a state officer "undertaken without any authority whatever" that is not entitled to eleventh amendment immunity. Id. at 697; see also Pennhurst, 465 U.S. at 101 n.11. As the Pennhurst court noted, "an ultra vires claim rests on 'the officer's lack of delegated power. A claim of error in the exercise of that power is therefore not sufficient.'" Id., quoting Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682, 690 (1949).[2]

In the instant case, defendants argue that the state insurance laws which they allegedly violated grant broad discretion to the commissioner to take action against an insurance company which is in

financial trouble.[3] They contend that in their discretion, they decided that Cadillac ought to have an opportunity to rehabilitate itself by improving its financial condition, before the state took steps to end Cadillac's existence. They argue that they both monitored Cadillac's condition, and that Shah took immediate action to place the company in conservatorship when it became clear that Cadillac was not successful in improving its condition. All of these actions, defendants assert, were authorized by Michigan law and were within the lawful grant of discretionary authority to the commissioner.

Defendants' argument fails for two reasons, however. First, plaintiffs allege that the statute defendants violated is M.C.L. § 500.228, which provides:

> If it appears from any examination made by the commissioner or from any report made to him pursuant to this code, that any provisions of this code or of any laws of the state have been violated, the commissioner shall immediately report such violation to the attorney general in writing and the attorney general shall take such action thereon as the facts warrant. (Emphasis added).

Pursuant to this provision, the commissioner has no discretion to decide not to report violations to the attorney general; instead, he must do so immediately. A decision by the commissioner not to report a known violation is conduct undertaken "'without any authority whatever'" by a state officer and is not entitled to eleventh amendment immunity. See Pennhurst, 465 U.S. at 101 n.11, quoting Treasure Salvors, 458 U.S. at 697. In this case, the allegation is not merely that defendants erred in exercising some discretionary authority granted

to them by the state, but rather that they had no discretionary power whatsoever. See id., quoting Larson, 337 U.S. at 690.[4]

Secondly, plaintiffs' argument that defendants are not entitled to eleventh amendment immunity finds support in other language in Pennhurst, the case which defendants themselves assert controls in this case. In rejecting the application of the ultra vires doctrine in Pennhurst, the court state:

> [The] view that the named defendants here were acting beyond and contrary to their authority cannot be reconciled with relaity -- or with the record. The District Court in this case held that the individual defendants "acted in the utmost good faith within the sphere of their official responsibilities," and therefore were entitled to immunity from damages ... The named defendants had nothing to gain personally from their conduct; they were not found to have acted willfully or even negligently.

Id. at 107.

In the instant case, plaintiffs do allege that the defendants (1) acted in bad faith, (2) acted outside the sphere of their official responsibilities, (3) sought personal political gain from their conduct, and (4) acted willfully or with gross negligence. Thus, there is a factual dispute between the parties as to whether defendants acted within the scope of their authority.[5]

D.

Although the court is empowered, when deciding a Rule 12(b)(1) motion, to resolve factual disputes, see Moir 895 F.2d at 269, the court finds that it is inappropriate at this point in the proceedings to dismiss the complaint on the grounds that plaintiffs cannot prove a claim that defendants acted ultra vires

with respect to the examination of Cadillac's financial situation. Clearly, plaintiffs will have to bring forth evidence to support such allegations at trial or perhaps in response to a motion for summary judgment. The court finds that it is unwise to resolve the factual dispute at this stage of the proceedings without the benefit of any substantive evidence.

Accordingly, the court believes that the better practice is to defendants' motion to dismiss without prejudice. The court will permit defendants to raise the eleventh amendment immunity issue in a motion for summary judgment or at any other appropriate point in the proceedings. As Pennhurst indicates, plaintiffs must bring forth sufficient facts to support their allegation that these defen-

dants knew that Cadillac's financial status represented a violation of state insurance law and did not report it. They must substantiate their allegations that defendants acted willfully or negligently in order to personally benefit from their actions. If plaintiffs do not make such a factual showing, the court will dismiss plaintiffs' claims for lack of subject matter jurisdiction based on the eleventh amendment.

The court will, however, deny defendants' Rule 12(b)(6) motion concerning defendants' absolute immunity with prejudice. The highest appointive or elected governmental officials are absolutely immune from suit only when they are acting within their official authority. See Ross v. Consumers Power Co., 420 Mich. 567, 633-34 (1984); M.C.L. § 691.1407(5);

see also Berlin v. Superintendent of Public Schools, 181 Mich. App. 154, 161 (1989) ("For purposes of individual immunity, ultra vires actions are defined as 'those which are unauthorized and outside the scope of employment'"). "[N]o individual immunity exists for ultra vires activities." Ross, at 634.[6] As discussed above, assuming that defendants are the highest appointed officials in the department, plaintiffs allege that defendants did not act within their authority when they failed to report Cadillac's alleged violation" of state insurance law pursuant to M.C.L. § 500.228. Because the court has already indicated that plaintiffs could prove a set of facts to support such a claim for relief, the court must deny defendants' motion to dismiss for failure to state a

claim. See n. 1 above.

Defendants' other assertions with respect to absolute immunity do not compel a different result. Defendants argue that the commissioner must keep financial information about insurance companies confidential to avoid a run on a troubled institution. State laws regarding the confidentiality of examination reports fully address this concern, however. It is clear that "the commissioner may withhold any examination report from public inspection for such time as he or she may deem proper." M.C.L. § 500.222(4), as amended. What the commissioner cannot do, under § 500.228, is fail to report violations of insurance laws to the attorney general as alleged in this case. Defendants have cited nothing in the language or legislative history of either section

which would indicate that the commissioner may refuse to report violations to the attorney general in order to protect the confidentiality of the financial status of an insurance company under examination.[7] The court will therefore deny with prejudice defendants' motion to dismiss with respect to the immunity issue.

For the reasons set forth above,

IT IS HEREBY ORDERED that defendants' motion to dismiss, filed February 23, 1990, is DENIED without prejudice with respect to their challenge to the court's subject matter jurisdiction over the case, and DENIED with prejudice with respect to their assertion that plaintiffs have failed to state a claim upon which relief can be granted.

/s/
BERNARD A. FRIEDMAN
UNITED STATES DISTRICT JUDGE

Dated: May 16 1990

1

The only argument defendants make in the nature of a Rule 12(b)(6) motion is that plaintiffs' claims are barred by defendants' absolute immunity from suit. In ruling on a Rule 12(b)(6) motion, the court must accept as true all factual allegations in the complaint. Nishiyama v. Dickson County, Tenn., 814 F.2d 277, 279 (6th Cir. 1987) (en banc). "The court must deny the motion to dismiss unless it can be established beyond a doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Id.; see also Conley v. Gibson, 355 U.S. 41, 45-46 (1957).

2

The Pennhurst court's decision questioned the continued vitality of the ultra vires exception to the eleventh amendment. 465 U.S. at 114 n.25.

The court added: "We hold . . . that to the extent the [ultra vires] doctrine is consistent with the analysis of this opinion, it is a very narrow exception [to the eleventh amendment] that will allow suit only under the standards set forth [at 465 U.S. 101] n. 11." Id. In note 11, as cited above, the court indicated that the ultra vires doctrine applies only in cases where the state officials act (1) without any authority whatever, (2) where there is no colorable basis for the exercise of authority, or (3) lacking delegated power. An error in the exercise of the power is not enough. Id. at 101 n.11.

3

Defendants cite M.C.L. §§ 500.222(1)

and 500.7802 in this regard. Section 500.222(1) provides in part that the commissioner has the authority to examine all of the financial records of any insurance company at any time. This clearly implies that the decision to initiate any such examination is within the discretion of the commissioner. A decision not to act under this section is not ultra vires.

Section 500.7803 provides in part that whenever an insurance company is found, after an examination, "to be in such a condition that further transaction of business will be hazardous to its policyholders, or to its creditors, or to the public, or" if the company is "in such condition that it could not meet the requirements for incorporation and authorization," then

> The commissioner may, the attorney general representing him, apply . . . for an order directing such corporation to show cause why the commissioner should not take possession of its property and conduct its business, or for such other relief as the nature of the case and the interests of its policyholders, creditors, stockholders, or the public may require.

M.C.L. § 500.7802.

There is no doubt that this section also allows the commissioner the discretionary authority to act when the commissioner determines that it is appropriate to do so. Again, a decision not to act under this section is not ultra vires.

4

The court finds unpersuasive defendants' argument that they did not act beyond the scope of their duties because plaintiffs only allege a failure to act on defendants' part. Under § 500.228, defendants had no discretion not to act if they believed that Cadillac had violated any state insurance law. If state law required that defendants act and they did not, their inaction was beyond the scope of their authority and was unauthorized.

5

The court notes that Cowan v. University of Louisville School of Medicine, No. 89-5677 (6th Cir. April 10, 1990), cited by defendants, does not compel a finding that the eleventh amendment bars plaintiffs' suit. In Cowan, the court held that the eleventh amendment barred all suits against university officials in their official capacities, see id., slip op. at 12, and that there was no evidence in the record to show that they acted outside of their official capacities. Id. at 14. The court agrees that the eleventh amendment bars suit against defendants Shah and Coleman in their official capacities. However, unlike Cowan, the court finds that plaintiffs might be able to bring forth evidence to show that defendants acted outside of their official capacities.

6

Richardson v. Jackson County, 432 Mich. 377 (1989), cited by defendants at the hearing, is not controlling with regard to the absolute immunity issue. As

plaintiffs point out, Richardson deals with governmental immunity rather than individual immunity.

7

Defendants have also cited M.C.L. § 500.222(5), as amended, in this regard but have not explained its relevance to the case at bar. Accordingly, the court will not address that provision.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

CORPORATE RISK MANAGEMENT CORPORATION, a New York corporation, MIH CONSULTANTS, INC., a New York corporation, and MARTIN HOFFMAN, a New York resident,

Plaintiffs,

v.

Civ. Action No. 89-73690
Hon. Bernard A. Friedman

ERNEST SOLOMON, LARRY V. KALOSIS, JANICE K. AHO, CHITO Q. CASTRO, GLORIA SOLOMON, HARRY NELSON, LOIS NELSON, INA S. SACHS, STEPHEN BROMBERG, ARLAN'S INSURANCE AGENCY, BARRY L. CHARLIP, C.P.A., HERMAN COLEMAN and DHIRAJ N. SHAH,

Defendants.
_____/

MEMORANDUM OPINION AND ORDER

This matter is before the court on defendants Herman Coleman and Dhiraj N. Shah's motion for reconsideration of the

court's memorandum opinion and order of May 16, 1990, denying their motion to dismiss. Pursuant to Rule 17(m)(2) of the Local Rules of the United States District Court for the Eastern District of Michigan, the court shall decide this motion without a response or a hearing.

With respect to motions for reconsideration, Local Rule 17(m)(1) provides that "[a]ny motion . . . for rehearing or reconsideration shall be served not later than 10 days after entry of such judgment or order." In the instant case, defendants filed their motion on June 5, 1990, more than 10 days after entry of the court's order on May 16, 1990, computed pursuant to Fed. R. Civ. P. 6(a). Even when credited with additional time for service by mail under Rule 6(e), defendants' motion was still not filed within

the 10 day period of Local Rule 17(m)(1) and is therefore untimely. Accordingly, the court will deny defendants' motion as untimely.

In addition, even if the court were to consider the merits of defendants' motion, the court would deny the motion. Regarding the grounds for granting or denying a motion for reconsideration, Local Rule 17(m)(3) provides:

> Generally, and without restricting the discretion of the Court, motions for rehearing or reconsideration which merely present the same issues ruled upon by the Court, either expressly or by reasonable implication, shall not be granted. The movant shall not only demonstrate a palpable defect by which the Court and the parties have been misled but also show that a different disposition of the case must result from a correction thereof.

In this case defendants raise totally new issues in their motion for reconsid-

eration which they did not raise in their original motion or their supplemental brief submitted after the hearing. Their sole argument in their original motion was that they are entitled to immunity under the eleventh amendment to the United States Constitution. They argued that as a result, the court should dismiss the complaint as against them for lack of subject matter jurisdiction and for failure to state a claim. Although the court was prepared to rule on defendants' motion at the hearing, at that time defendants first raised the defense of absolute immunity under Michigan law.

Because plaintiffs were not adequately prepared to respond to this new issue at the hearing, the court permitted both sides to simultaneously file supplemental briefs on the question. Defendants

used that opportunity to not only respond to the absolute immunity issue, but they also made additional arguments with respect to the applicability of the eleventh amendment.

In their motion for reconsideration, defendants now argue for the first time that the court should grant their motion to dismiss for failure to state a claim because they do not owe a special duty to plaintiffs and their actions did not constitute the proximate cause of plaintiffs' injury. Thus, instead of demonstrating that there was a palpable defect by which the court and the parties were misled when the court entered its order denying the motion, defendants raise completely new issues for the first time on reconsideration even though they had three previous opportunities to bring to

the court's attention any and all issues relevant to their motion.

Because defendants did not raise the duty or causation issues either in their original motion, at the hearing, or in the supplemental brief, the court cannot consider them at this point in the proceedings.

Further, the court notes that Local Rule 17(m)(2) does not permit a response to a motion for reconsideration, unless the court otherwise so directs. Thus, plaintiffs normally would not have the opportunity to respond to the new issues defendants raise absent a special order of the court. As a general matter, it is impermissible for a party to mention an issue for the first time in a context in which the opponent does not have an opportunity to respond. United States v.

Jerkins, 871 F.2d 598, 602 n.3 (6th Cir. 1989). For this reason as well the court will deny defendants' motion.

For the reasons set forth above,

IT IS HEREBY ORDERED that defendants Coleman and Shah's motion for reconsideration, filed June 5, 1990, is DENIED.

/s/
BERNARD A. FRIEDMAN
UNITED STATES DISTRICT JUDGE

Dated: JUN 20 1990

Nos. 90-1713, 90-1730

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

CORPORATE RISK MANAGEMENT CORPORATION, et al.,	)	Filed SEP 5 1991
Plaintiffs-Appellees,	)	
v	)	ORDER
ERNEST SOLOMON, et al.,	)	
Defendants,	)	
HERMAN COLEMAN and DHIRAJ N. SHAH,	)	
Defendants-Appellants.	)	

BEFORE: NELSON and NORRIS, Circuit Judges, and LIVELY, Senior Circuit Judge.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a

vote on the suggestion of rehearing en banc, the petition has been referred to the original hearing panel. The panel has further reviewed the petition and concludes that it is not well taken.

It is true, as the panel noted at page four of its opinion of July 2, 1991, that the essence of an Eleventh Amendment claim is a right not to stand trial. Sovereign immunity -- the fundamental principle affirmed in the Eleventh Amendment -- "is immunity from suit, not just from liability . . . ." Gould, Inc. v. Pechiney Ugine Kuhlmann, 853 F.2d 445, 451 (6th Cir. 1988).

It is also true that the availability of Rule 56, Fed. R. Civ. P., as a vehicle for asserting sovereign immunity does not preclude interlocutory appeals of otherwise appealable orders denying sovereign

immunity claims asserted under Rule 12, Fed. R. Civ. P. Kennedy v. City of Cleveland, 797 F.2d 297 (6th Cir. 1986), cert. denied, 479 U.S. 1103 (1987); Dominque v Telb, 831 F.2d 673 (6th Cir. 1987).

But it does not follow that every denial of a claim of sovereign immunity is immediately appealable, regardless of whether the denial is, to borrow the language of Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 546 (1949), "unfinished or inconclusive." See Sinclair v. Schriber, 834 F.2d 103 (6th Cir. 1987), where our court, speaking through the judge who wrote the opinions in both Kennedy and Dominque, said in effect that the finality necessary for an order to be appealable under Cohen is not present when a claim of immunity is denied with-

out prejudice.

We do not read Sinclair v. Schriber as turning on the fact that the claim of immunity was asserted there under Rule 56 rather than under Rule 12. Rule 12(b)(1), on which the petitioners relied in the case at bar, empowers a court to look beyond the pleadings, just as Rule 56 does. And looking beyond the pleadings in this case, the district court saw a factual dispute that could not be resolved on the record as it then stood.

The factual dispute, as the court said at page 13 of its memorandum opinion and order of May 16, 1990, was a dispute "as to whether [the petitioners] acted within the scope of their authority." The plaintiffs, as the court summed it up, were alleging that the petitioners:

> "(1) acted in bad faith, (2) acted outside the sphere of their official

> responsibilities, (3) sought personal political gain from their conduct, and (4) acted wilfully...." Id.

The plaintiffs' allegations might well have been unfounded, but the district court was not prepared to make that determination "without the benefit of any substantive evidence." Id. at 14.

Like the amended complaint and cross-claim at issue in United States v. Yonkers Bd. of Educ., 893 F.2d 498 (2nd Cir. 1990), the complaint with which we are concerned in the instant case asserts claims against the petitioners, which, if proven, would not be barred by the Eleventh Amendment and the sovereign immunity doctrine of which the amendment is an affirmation. The sovereign immunity doctrine simply does not bar actions for money damages against state officials sued in their personal capacities.

Scheuer v. Rhodes, 416 U.S. 232, 237-38 (1974); Foulks v. Ohio Dep't of Rehabilitation and Correction, 713 F.2d 1229, 1233 (6th Cir. 1983); Spruytte v. Walters, 753 F.2d 498, 511-12 (6th Cir. 1985), cert. denied, 474 U.S. 1054 (1986). Cowan v. Univ. of Louisville School of Medicine, 900 F.2d 936 (6th Cir. 1990), on which the petitioners relied in the district court, "does not stand for the proposition that every time a state official is charged with misconduct while acting within the general ambit of his job title eleventh amendment immunity comes into play." Ritchie v. Wickstrom, No. 90-2280 (6th Cir. July 23, 1991), (reported at 1991 U.S. App. LEXIS 15899). See also Berryman v. Johnson, Nos. 88-1239/1280 (6th Cir. August 6, 1991), where we rejected an Eleventh

Amendment defense asserted on behalf of Michigan prison officials sued in their personal capacities.

"Denials of motions to dismiss on grounds of immunity, including Eleventh Amendment immunity, are not appealable . . . unless the immunity defense can be decided solely as a matter of law." Yonkers Bd. of Educ., 893 F.2d at 502 (citations omitted). The immunity defense asserted by the petitioners in the case at bar cannot be decided solely as a matter of law -- or at least it cannot be so decided in the petitioners' favor -- and the petition for rehearing is therefore DENIED.

ENTERED BY ORDER OF THE COURT

/s/
Leonard Green, Clerk

Nos. 90-1713, 90-1730

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ORDER

CORPORATE RISK MANAGEMENT CORPORATION, a New York corporation; MIH CONSULTANTS, INC; MARTIN HOFFMAN Plaintiffs-Appellees v. HERMAN COLEMAN; DHIRAJ N. SHAH; Defendants-Appellants. ERNEST SOLOMON; LARRY V. KALOSIS Defendants,	Filed SEP 13 1991

Upon consideration of the appellant's motion to stay the mandate pending an application for a writ of certiorari to the Supreme Court,

It is ORDERED that the motion be, and

it hereby is, GRANTED. The mandate shall be stayed for 60 days pending said application.

ENTERED BY ORDER OF THE COURT

Leonard Green, Clerk

/s/